No. 14,461

IN THE

United States Court of Appeals

For the Ninth Circuit

HITAKA SUDA,
Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

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PRELIMINARY STATEMENT.

The issues in this case are similar to those in *Fujii v. Dulles,* No. 14460 in this Court, with one exception; that is, the issue of supplementary matter present in the *Fujii* case is not present here. Appellee's Brief in *Fujii* is being filed at the same time as this Brief. Counsel for Appellant and Appellee are the same in both cases. To save time of Court and counsel, and to save expense, the argument made in the *Fujii* brief will not be repeated but is referred to herewith and incorporated herein by reference.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

The Appellee agrees with Appellant's statement of jurisdiction except that the District Court did not have jurisdiction over the subject matter under 8 USC Section 903, but had jurisdiction to decide jurisdiction under 8 USC Section 903.

STATEMENT OF THE CASE.

Appellee agrees with Appellant's statement of the case.

STATUTES INVOLVED.

In addition to the statute cited by Appellant (Opening Brief, page 3), there is involved: 8 USC Section 901:

> "*Procedure when diplomatic official believes that person in foreign state has lost American nationality.* 'Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his American nationality under any provision of subchapter IV of this chapter, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations to be prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Department of Justice, for its information, and the diplomatic or consular office in which the report was made

shall be directed to forward a copy of the certificate to the person to whom it relates. Oct. 14, 1940, c876, Title I, sub-chap. V, § 501, 54 Stat. 1171.'

"Section 403(a)(42) of the Immigration and Nationality Act, 1952, (66 Stat. 166 et seq.)

"Sec. 403(a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

(42) Act of October 14, 1940 (54 Stat. 1137)"

FACTS.

Appellee disagrees with Appellant in the following aspects:

(a) There is no allegation of denial of the passport applied for in the Amended Complaint and/or the denial of a right or privilege of a national of the United States on the ground that he is not a national. (R. 10-12);

(b) On December 18, 1952, the Washington Office of the Department of State approved the Certificate of Loss of Nationality of the Appellant. (R. 11);

(c) That on November 25, 1952 the Vice-Consul at Kobe, Japan may have been acting as an agent for and on behalf of Defendant, Secretary of State (R. 11) but not in the matter of making a decision as to (1) denial of a right or privilege of a national, or (2) issuance of a Certificate of Loss of Nationality, 8 USC Sections 901, 903;

(d) That on December 18, 1952 the Washington Office of the Department of State may have approved a Certificate of Loss of Nationality (R. 11) but not the denial of a right or privilege on the ground that he is not a national of the United States. 8 USC Sections 901, 903.

ARGUMENT.

The argument itself being short, no summary of argument is felt to be necessary.

As has been noted *supra,* in the *Fujii* case, there is one additional element present. The Complaint there was filed before the approval of the Certificate of Loss of Nationality, whereas here, the Certificate of Loss was issued by the Washington Office prior to the filing of the Complaint.

As has been previously briefed in *Fujii,* this element should make no difference at all. As has been stated, a Certificate of Loss of Nationality is a document which states a fact. The existence of Certificate of Loss does not *ipso facto* mean a denial of a right or privilege as a national of the United States. The first opportunity that a denial could occur is when the statute has run its full course. 8 USC Section 901. This means delivery to the applicant. It is at that point, and thereafter, that a denial could appear, but not before.

It appears necessary again to draw into sharp focus the difference between a denial and a Certificate of

Loss of Nationality. A denial states that a claimed right or privilege has been denied. A Certificate of Loss states a fact, and only after delivery of this Certificate could circumstances, occurrences and events happen which might constitute a denial.

Appellant states that the words of the statute were followed, consequently, the Complaint is sufficient. This broad statement is undoubtedly true generally, but here, at least two considerations become important: (1) The statute was repealed at the end of the day that the Complaint was filed, Immigration and Nationality Act, 1952. Consequently, the date of the denial becomes very important; and (2) The unequivocal statement of denial (R. 11) is not only watered down but completely nullified by the modifying statements as to what constituted the denial. (R. 11.)

Appellant again alludes to the fact that the preparation of the Certificate of Loss of Nationality by the Vice-Consul is a denial of a right or privilege. This is a completely fallacious argument in view of the provisions of 8 USC Section 901.

Further, Appellant cites with approval *Wong Wing Foo v. McGrath,* 196 F. 2d 120, 122. This case, as has been noted before, stands for an entirely different principle and is not applicable here.

At this point Appellee wishes to call to the attention of the Court the sequence of pleadings as it existed both here and in the *Fujii* case. In both cases Complaints were filed in the dark, so to speak, hoping

that the facts of the case would eventually come to the rescue of the pleader. The period from November 4, 1952, the date of the application for a passport, to December 23, 1952, the date of filing the original Complaint, would not in any sense constitute the unreasonable delay alleged. The propriety of this type of pleading, under Rule 11, Federal Rules of Civil Procedure, has been commented on in this case (R. 35) and should not in any sense be allowed to pass without drawing the full attention of the Court to it.

CONCLUSION.

As in the *Fujii* case, there is no allegation of a denial of a right or privilege of a national of the United States. The Amended Complaint did not state jurisdiction over the subject matter and was properly dismissed.

Dated, Honolulu, Territory of Hawaii,
March 15, 1955.

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